Supreme Court, U. S.
FILED
AUG 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 76-233

CITY OF DAYTON,

RESPONDENT

VS.

WALTER OTTO,

Petitioner

* *

PETITION FOR WRIT OF CERTIORARI

* *

WALTER OTTO

1017 LINDA VISTA AVENUE, APT. 8

DAYTON, OHIO 45405

PETITIONER IN PERSON

TABLE OF CONTENTS

PRAYER Page (s)
I. REFERENCE TO REPORTS OF OPINIONS BELOW. . .1
II. GROUNDS OF JURISDICTION OF THIS COURT. . .1-2
III. QUESTIONS PRESENTED FOR REVIEW 2-3
IV. CONSTITUTIONAL PROVISIONS AND LAWS INVOLVED 3-4-5
V. STATEMENT OF THE CASE. . . . . 5 thru 9
VI. AMPLIFYING ARGUMENT FOR ALLOWANCE OF THE WRIT . . . . . .9 thru 16
PROOF OF SERVICE 16
APPENDIX A-1
Opinion, Court of Appeals of Montgomery County, Ohio A-1
Judgment or Decree, Supreme Court of Ohio A-2
CASES CITED
Buchalter v. New York, 319 U.S. 427 14
Connally v. General Construction Co., 269 U.S. 385. 11
Liggett (Louis K.) Co., v. Baldridge, 278 U.S. 105. 11
Lisenba v. California, 314 U.S. 219 14
Powell v. Alabama, 287 U.S. 45. 12
Snyder v. Massachusetts, 291 U.S. 97. . 12-14
Triegle v. Acme Homestead Assoc., 297 U.S. 189. 11
Winters v. New York, 333 U.S. 507 11
CONSTITUTIONAL PROVISIONS AND LAWS CITED
Constitution of the United States, Amendment 4 . . . . . .3, 11
Constitution of the United States, Amendment 6 . . . . . .3, 14
Constitution of the United States, Amendment 14. . . . . 2, 3, 7, 10, 12, 15
Title 28, United States Code, Section 1257 (3). 2, 4
Code of General Ordinances, City of Dayton, Ohio, Section 806-31. . . . . .1-2, 4, 6, 8-12
Code of General Ordinances, City of Dayton, Ohio, Section 806-83C 5, 10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. _____

CITY OF DAYTON,

Respondent

vs

WALTER OTTO,

Petitioner

* *

PETITION FOR WRIT OF CERTIORARI

* *

Petitioner, Walter Otto, prays that a Writ of Certiorari issue to review the final judgment or decree of the Supreme Court of Ohio in the above entitled proceeding, as rendered and entered June 11, 1976 in Case No. 76-314 upon the docket of that court.

I. REFERENCE TO REPORTS OF OPINIONS BELOW

At this time petitioner is unaware of any publications of any opinions delivered in the courts below.

II. GROUNDS OF JURISDICTION OF THIS COURT

Jurisdiction of this court is invoked on grounds the Supreme Court of the State of Ohio, the highest court of the State of Ohio in which a decision could be had, has rendered a final judgment or decree dismissing an appeal, where the validity of Section 806-31 of the Code of

General Ordinances of the City of Dayton, State of Ohio, is drawn in question on the ground of its being repugnant to the due process of law clause of Amendment 14 to the Constitution of the United States; and, where a right is specially set up or claimed under the due process of law clause of Amendment 14 to the Constitution of the United States.

The judgment or decree sought to be reviewed was made and entered on June 11, 1976.

There is no order respecting a rehearing in this case, nor other order granting an extention of time within which to petition for certiorari.

The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari is Title 28, United States Code, Section 1257 (3).

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, making it an offense, punishable by imprisonment and fine, for any person merely to fail to obey the order of a housing inspector, is too indefinite, restrictive and liberty or property depriving to represent a proper and authorized exercise of the police power and is invalid in such respect, on the ground of its being repugnant to the due process of law clause of Amendment 14 to the Constitution of the United States.

2. Whether the act of the Municipal Court of Dayton, Ohio, imposing judgment and criminal penalties upon the accused, in a case tried by jury, without any jury verdict finding the accused guilty of any offense alleged in the affidavit, occurring at any time or at any place within the State of Ohio, is an act as deprives the accused of fundamental rights of liberty or property, without due process of law,

as specially set up or claimed under Amendment 14 to the Constitution of the United States.

3. Whether the act of a trial court imposing judgment and criminal penalties upon a jury verdict never filed in the record of the trial court, and never signed by any juror, and never received in open court by any judge or magistrate in the presence of any juror or the accused, and as never did exist in the case, is an act as deprives the accused of fundamental rights of liberty or property, without constitutional due process of law, as specially set up or claimed under Amendment 14 to the Constitution of the United States.

IV. CONSTITUTIONAL PROVISIONS AND LAWS INVOLVED

Constitution of the United States, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Constitution of the United States, Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherin the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution of the United States, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, United States Code, Section 1257 (3)
Section 1257, State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

***

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

(June 25, 1948, ch. 646, 62 Stat. 929.)

Code of General Ordinances of the City of Dayton, State of Ohio, Section 806-31:
Section 806-31. NOTICE OF VIOLATIONS.
Whenever the Housing Inspector determines that there has been a violation of any provision of this ordinance, excepting violation of Section 806-30, he shall give notice of such violation to the person or persons responsible therefore and order compliance with the ordinance, as hereinafter provided. Such notice and order shall:

(a) Be put in writing on an appropriate form;

(b) Include a list of violations, refer to the section or sections of the ordinance violated and order remedial action which,

if taken, will effect compliance with the provisions of this ordinance;

(c) Specify a reasonable time for performance;

(d) Advise the owner, operator or occupant of the procedure for appeal; excepting emergency orders issued pursuant to Section 806-35 and citations issued pursuant to Section 806-29 C. G. O.

(e) Be served upon the owner, occupant or agent in person provided, however, that such notice and order shall be deemed to be properly served upon, such owner, occupant, or agent if a copy thereof is sent by registered mail to his last known address and a copy is posted in a conspicuous place in or on the dwelling affected.

Any person failing to comply with the order served pursuant to this section shall be deemed guilty of a misdemeanor and subject to penalties set fourth in Section 806-83C, C. G. O., of the Housing Ordinance.

Code of General Ordinances, City of Dayton, State of Ohio, Section 806-83C:
Section 806-83C. PENALTIES.
A violation of any provision of this ordinance shall constitute a misdemeanor, and upon conviction thereof, the violator shall be punished by a fine of not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or both, and each day of failure to comply with any such provision shall constitute a separate violation.

V. STATEMENT OF THE CASE

On the 9th day of November, 1972, a Mr. Baxter executed an affidavit in the criminal division of

the Municipal Court of Dayton, Ohio, alleging in essence as follows, upon which a warrant for petitioner's arrest was issued, in Case No. 365144 upon the docket of that court:

"* * * that on or about the 8th day of November A.D. 1972, in the City of Dayton and in the County of Montgomery, and in the State of Ohio, did Walter Otto unlawfully fail to obey the legal orders of the Housing Inspector in regard to certain dwelling unit owned and occupied by the said Walter Otto, and located at 121-23 Rebecca, in said city. * * *. Contrary to the form of the ordinances to-wit: Section 806-31 C. G. O. of Dayton, Ohio."

This petitioner, Walter Otto, was tried by jury upon the issues raised by the charge in the affidavit, and the jury did sign and return and render the following verdict, as was filed in the record of the Municipal Court of Dayton, Ohio on June 1, 1973.

"We, the jury, being duly impaneled and sworn, do find the Defendant Walter Otto guilty of the charge of failure to obey the orders of Housing Inspector in violation of Section 806-31 of the Codified Ordinances of the City of Dayton, Ohio, as we do so render our verdict upon the concurrence of all twelve members of our jury.

"Each of us concurring in this verdict signed his or her name on the 1st day of June, 1973."

On June 7, 1973, the following judgment and sentence was imposed and entered upon the journal of the trial court:

"This cause coming on before the jury duly impaneled and sworn, and the said jury having heard the testimony adduced by the parties, the exhibits, the arguments of counsel, and the charge of the Court, after deliberation thereon, returned the following verdict, to-wit;

"'We, the jury in this case, being impaneled and sworn, do find upon the issues in this case, the defendant, Walter Otto, GUILTY as charged in the affidavit and do render our verdict upon the concurrence in said verdict signs his name this 1st day of June, 1973.'

"* * *

"IT IS, THEREFORE, considered and adjudged by the Court that Walter Otto the defendant, pay or secure to be paid a fine of $200.00 and that he pay the costs of prosecution, and the costs of Jury in the amount of $215.85 for which judgment is rendered against him, and execution awarded.

"It is further ordered that $200.00 of the fine be and the same hereby is suspended upon the future good behavior of the defendant and upon further condition that he has no more violations, of a similar nature."

The jury verdict quoted in the above journal entry is an untrue specification of the only verdict the jury did sign and return and render in the case, and as was filed in the record in the trial court on June 1, 1973.

On May 27, 1975 petitioner filed an amended complaint in the trial court requesting that the judgment and sentence made and entered June 7, 1973 be vacated or set aside.

In said amended complaint petitioner does allege that said judgment and sentence does infringe rights of liberty or property, without due process of law, repugnant to the due process clause of Amendment 14, United States Constitution; particularly, on the following grounds.

1. Petitioner was judged and sentenced upon a fake, sham or pretense jury verdict which was not signed and returned by the jury nor accepted by the court in the presence of petitioner;

2. Petitioner was judged and sentenced without being found guilty upon a charge that was made and upon which he was tried;

3. Petitioner was judged and sentenced without a finding that the matter charged against petitioner, or found against petitioner, did take place within the territorial jurisdiction of the trial court, or within the State of Ohio.

4. Petitioner was judged and sentenced under provisions of Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, making it an offense punishable by imprisonment and fine for any person merely to fail to obey the order of housing inspector.

5. Petitioner was judged and sentenced by a court that had no jurisdiction of the subject matter in this case, and that had no jurisdiction to render said judgment and sentence.

The prayer of the amended complaint was denied by journal entry on June 5, 1975, without hearing of any kind, and without opinion.

This order of the Municipal Court of Dayton, Ohio, was appealed to the Court of Appeals of Montgomery County, Ohio, where the federal questions sought to be reviewed were raised by assignments of error, in Case No. 4933. That Court of Appeals, by opinion rendered January 19, 1976, did find nothing in the record which, in their opinion, would support or justify a reversal of the original judgment and sentence, and accordingly the judgment would be affirmed. On February 2, 1976, the appeals court did affirm the judgment of the Municiapl Court of Dayton, Ohio, pursuant

to the decision rendered by that court on January 19, 1976.

This judgment of the Court of Appeals was appealed to the Supreme Court of Ohio, where the federal questions sought to be reviewed were raised by propositions of law, in Case No. 76-314. On June 11, 1976, without separate opinion, by journal entry, the Supreme Court of Ohio dismissed the appeal for the reason no substantial constitutional question existed therin, in their opinion.

VI. AMPLIFYING ARGUMENT FOR ALLOWANCE OF THE WRIT

The Supreme Court of Ohio has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court, as hereinafter more fully and clearly appears.

A. First question decided by the Supreme Court of Ohio and argument thereon

1. Whether Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, making it an offense, punishable by imprisonment and fine, for any person merely to fail to obey the order of a housing inspector is too indefinite, restrictive and liberty or property depriving to represent a proper and authorized exercise of the police power and is invalid in such respect, on the ground of its being repugnant to the due process of law clause of Amendment 14 to the Constitution of the United States.

Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, defines as criminal the offense of "* * * failing to comply with the order served pursuant to this section * * *"

This ordinance section, in practical operation, as shown by the jury verdict accepted in open court and filed in the record of the trial court on June 1, 1973, makes criminal the mere failure of any person to obey the order of a housing inspector. The punishment for this offense includes up to 30 days imprisonment or up to $200.00 fine, or both, for each day of failure to comply, as set forth in Section 806-83C of said Code of General Ordinances.

Persons in the State of Ohio possess rights of liberty and property protected by Amendment 14 to the Constitution of the United States, and by merely failing to comply with an order served or by merely failing to obey the order of a housing inspector, without more, petitioner commits no crime. It must be noted that the ordinance section in question applies to any person.

Amendment 14 to the Constitution of the United States provides in part;

"* * *nor shall any State deprive any person of * * * liberty or property without due process of law; * * *"

By reason of the foregoing, Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio is in conflict with this provision of Amendment 14 to the Constitution of the United States.

A warrant for the arrest of petitioner was issued for violation of the ordinance section in question, and the very existence of this ordinance section provides the means by which citizens may be seized and charged with a criminal offense carrying sanctions of incarceration, fine, and a criminal record.

The 4th Amendment of the Constitution of the United States provides in part:

"The right of the people to be secure in their persons * * * against unreasonable * * * seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, * * *"

The 4th Amendment shields the citizen from being seized by police without probable cause.

Accordingly, petitioner argues that the ordinance section in question violates rights secured to the people by Amendment 4 to the Constitution of the United States as applied to the States by the due process of law clause of Amendment 14 to the Constitution of the United States.

Section 806-31 of the Code of General Ordinance of the City of Dayton, State of Ohio, is so indefinite that men of common intelligence are necessarily required to guess at its meaning, either as to the persons within the scope of the act, or the scope of the order within the scope of the act, or as to applicable tests to ascertain guilt, as violates the first essential of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391; Winters v. New York, 333 U.S. 507, 509-510, 515 (1948).

The ordinance section in question has as a plain purpose the imposition of criminal penalties against the liberty or property of any person merely failing to comply with the order served pursuant to this section, or the mere failure to obey the order of a housing inspector, which purpose does not bear a real and substantial relation to health, safety, morals or general welfare of the public, as it must for said ordinance section to be valid. Triegle v. Acme Homestead Asso., 297 U.S. 189, 197 (1934); Liggett (Louis K.) Co. v. Baldridge, 278 U.S. 105, 111-112 (1928).

The ordinance section in question makes it a criminal offense, punishable by fine and imprisonment for any person merely to fail to comply with an order served, or to merely fail to obey the order of a housing inspector, without any person being given notice of hearing and opportunity to be heard in defense against the reasonability and validity of said order, as violates immutable principles of justice which no State of the Union may disregard. Powell v. Alabama, 287 U.S. 45, 68 (1932); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

For one or more or all of the reasons stated, Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, is too indefinite, restrictive and liberty or property depriving to represent a proper and authorized exercise of the police power and is invalid in such respect, on the ground of its being repugnant to the due process of law clause of Amendment 14 to the Constitution of the United States.

B. Second question decided by the Supreme Court of Ohio and argument thereon

2. Whether the act of the Municipal Court of Dayton, Ohio, imposing judgment and criminal penalties upon the accused, in a case tried by jury, without any jury verdict finding the accused guilty of any offense alleged in the affidavit, occurring at any time or at any place within the State of Ohio, is an act as deprives the accused of fundamental rights of liberty or property, without due process of law, as specially set up or claimed under Amendment 14 to the Constitution of the United States.

The only jury verdict in this case was filed June 1, 1973, and that jury verdict did find this petitioner GUILTY of failure to obey the orders of a housing inspector in violation of Section 806-

31 of the Code of General Ordinances of the City of Dayton, Ohio, without more.

The jury did not find this petitioner guilty of any offense alleged in the affidavit, filed in the record of the trial court on November 9, 1972, in that the jury did not respond to any of the following trial issues raised by the charge in the affidavit:

1. That petitioner did fail to obey orders of a housing inspector in regard to a certain dwelling unit owned and occupied by petitioner, and located at 121-33 Rececca, in the City of Dayton, State of Ohio.

2. That any order of a housing inspector petitioner did fail to obey was a reasonable and legal order, in writing, and properly served, pursuant to the ordinance section in question.

3. That the crime charged was committed on or about November 8th, 1972.

4. That the crime charged was committed within the territorial jurisdiction of the trial court, or within the State of Ohio.

For the reasons stated the jury verdict was so unresponsive to the issues submitted, as raised by the charge in the affidavit, that it did not decided the question in issue in such a way as to enable the trial court to intelligently base a judgment thereon. Nevertheless, on June 7, 1973, the trial court did impose and enter judgment upon this accused, with criminal penalties of fine of $200.00 and costs in the amount of $215.85, with the fine suspended upon the future good behavior of this petitioner and upon further condition that he has no more violations, of a similar nature.

Amendment 6 to the Constitution of the United States provides in part:

"In all criminal prosecutions the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *"

Accordingly, petitioner argues that the act of the trial court in question violates the right secured to accused in all criminal prosecutions, by the above provision of Amendment 6 to the Constitution of the United States, as applied to the States by the due process of law clause of Amendment 14 to the Constitution of the United States.

The act of the trial court imposing judgment and sentence upon the accused in a criminal prosecution under the circumstances depicted, and as apparent and manifest from the record, is of such quality as necessarily prevents a fair trial.

In similar regard, this court has decided as follows:

"Due process of law" requires that the proceedings shall be fair. Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934).

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219 (1941).

"The due process clause", as applied in criminal trials "requires that action by a State through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions." Buchalter v. New York, 319 U.S. 427, 429 (1943).

Amendment 14 to the Constitution of the United States provides:

"* * * nor shall any State deprive any person of * * * liberty or property, without due process of law * * *".

For one or more or all of the reasons stated, the act of the trial court in question did deprive this accused of fundamental rights of liberty or property, without due process of law, as specially set up or claimed under the due process of law clause of Amendment 14 to the Constitution of the United States.

C. Third question decided by the Supreme Court of Ohio and argument thereon

3. Whether the act of a trial court imposing judgment and criminal penalties upon a jury verdict never filed in the record of the trial court, and never signed by any juror, and never received in open court by any judge or magistrate in the presence of any juror or the accused, and as never did exist in the case, in an act as deprives the accused of fundamental rights of liberty or property, without constitutional due process of law, as specially set up or claimed under amendment 14 to the Constitution of the United States.

The only jury verdict of which the trial court speaks in its judgment entry journalized on June 7, 1973 does find this petitioner GUILTY as charged in the affidavit.

As apparent and manifest from the record in the trial court, including the Bill of Exceptions (transcript of proceedings at trial), the jury verdict spoken of in said judgment entry was never filed in the record of the trial court, was never signed by any juror, was never received in open court by any judge or magistrate in the presence

of any juror or this petitioner, and never did exist in the case.

In further support of petitioners view on this third question petitioner adopts and incorporates and inserts herein by this reference the material and relevant argument in part "B" of this amplifying argument.

WHEREFORE, the Writ of Certiorari prayed for should be granted.

Respectfully submitted,

Walter Otto, Petitioner

PROOF OF SERVICE

I, Walter Otto, the petitioner herein do solemnly swear (or affirm) that three copies of this Petition for Writ of Certiorari were served upon all parties required to be served, by delivery, at the office of counsel of record, to counsel or a clerk therein.

Walter Otto, Petitioner

A-1
APPENDIX

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

CITY OF DAYTON :
Plaintiff-Appellee :
vs. : CASE NO. 4933
WALTER OTTO :
Defendant-Appellant:

. . . . . .

O P I N I O N

Rendered on the 19th day of January, 1976.

. . . . . .

BY THE COURT:

The defendant, Walter Otto, was tried by jury in the Municipal Court of Dayton and found guilty of failing to obey orders of a housing inspector in violation of Section 806-31 of the Codified ordinances of the City of Dayton, Ohio. From the judgment and sentence thereupon entered in the trial court, Mr. Otto appealed to the Court of Appeals where the judgment was affirmed on November 13, 1973. See City of Dayton v. Otto, Case No. 4320, (1973). The cause was subsequently dismissed by the Supreme Court of Ohio on May 10, 1974 for the reason that no substantial constitutional question existed therein.

On April 23, 1975, Mr. Otto filed what has been styled a "complaint for post-conviction" requesting that the previous judgment and sentence be vacated and set aside. The prayer of the amended complaint was denied on June 5, 1975, and this order of the Municipal Court apparently provides the basis for the present appeal.

For his assignments of error, the appellant urges that the trial court (1) erred in the judgment and sentence and (2) erred for reasons apparent and manifest from the record.

A-2

We have carefully examined the arguments in support of each of the alleged errors and find nothing in the record which, in our opinion, will support or justify a reversal of the original judgment and sentence.

Accordingly, the judgment will be affirmed.

KERNS, P. J., SHERER and McBRIDE, JJ. concur.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus.	:	1976 TERM To wit: June 11, 1976
City of Dayton, Appellee,	:	No. 76-314
vs.	:	APPEAL FROM THE COURT OF APPEALS
Walter Otto, Appellant.	:	for MONTGOMERY County

This cause, here on appeal as of right from the Court of Appeals for MONTGOMERY County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for MONTGOMERY County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of June 30, 1976

Thomas L. Startzman _____ Clerk

/ s / _____ Deputy